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No. 79-1311

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES A. CHUTE, ADMINISTRATOR OF THE ESTATE OF JAMES L. CHUTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioners contend that the United States is liable in damages for failing adequately to mark or remove the remains of an abandoned bombing target that was struck by the boat in which petitioners' decedents were passengers.

1. The facts, as summarized by the court of appeals (Pet. App. 12-14), are not in dispute. On September 30, 1971, petitioners' decedents were passengers in a boat owned and operated by Dr. Robert Baxter. While the boat was returning to Hyannisport, Massachusetts, from Nantucket Sound, it sank after striking the remains of a Navy patrol craft that in 1949 had been deliberately

grounded by the government for use as a bombing target. In 1961 the Navy ceased bombing practice in the area and removed restrictions on public access, but it did not remove the remains of the wreck, which were not visible above water. Several years after the Navy discontinued its use of the wreck, the Coast Guard marked it with a buoy.

At the time of the accident, the wreck was marked by a red and black buoy that projected three feet six inches above the water and was located 100 yards from the wreck. The navigational chart of the area accurately depicted the locations of the wreck and the buoy. The buoy was on station at its charter position when the accident occurred, but Dr. Baxter testified that he did not see the buoy prior to striking the wreck.

The district court found the United States liable for the accident and ensuing deaths (Pet. App. 28-52; 449 F. Supp. 172). The court held that "[o]nce the Coast Guard chose to exercise its discretion to warn mariners of the danger posed by the wreck, it had an obligation to do so properly" (Pet. App. 52), and that the failure adequately to mark the wreck or to demolish its remains did not satisfy that obligation (*ibid.*).

The court of appeals reversed (Pet. App. 11-27; 610 F. 2d 7). The court first concluded that the provisions of 33 U.S.C. 409 requiring the marking and removal of an unlawful obstruction that has been sunk in a navigable channel are not applicable to an obstruction that the government has placed for a proper purpose (Pet. App. 16). It then rejected petitioners' argument that under 14

U.S.C. 86[1] the government's discretion "in deciding whether or not, and how, to mark an obstruction * * * is subject to a judicially enforceable obligation to exercise [that discretion] 'responsibly' " (Pet. App. 18). The court assumed that "after the government [has] placed a hazardous obstruction * * * in navigable waters, it [is] required to warn the public of the potential danger" (*id.* at 27). However, the court concluded that "once the Coast Guard, the agency with special expertise in marking the myriad obstructions to navigation, has reached a reasoned judgment as to the appropriate marking and has accordingly marked, and the government has charted, the obstruction thus enabling a prudent mariner in the exercise of due care to avoid the hazard, all that is required has been done" (*ibid.*; footnote omitted).

2. Petitioners contend (Pet. 5-7) that the court of appeals' decision concerning the proper scope of 14 U.S.C. 86 conflicts with the decision of the Fourth Circuit in *Lane* v. *United States*, 529 F. 2d 175 (1975), and that review by this Court is warranted to resolve that conflict. We disagree.

Lane involved a suit in admiralty arising out of the collision of a boat with an unmarked sunken barge. The Fourth Circuit concluded that Section 86 does not impose upon the Secretary of Transportation a mandatory duty to mark every unremoved wreck in navigable waters. 529 F. 2d at 178. The court added, however, that in exercising

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[1] 14 U.S.C. 86 provides in pertinent part:

> The Secretary [of Transportation] may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters or waters above the continental shelf of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require [redacted] * * *.

his discretion the Secretary is not free "to ignore submerged wrecks of which he is informed, or fail to mark them if they constitute real dangers to navigation." *Id.* at 179. The court accordingly remanded the case for a determination whether the failure to mark the sunken barge was an abuse of the Secretary's discretionary authority to mark sunken wrecks under Section 86. 529 F. 2d at 180.

In contrast to *Lane*, this case does not concern the failure to mark a wreck, since there is no dispute that the remains of the former bombing target had been marked, that the positions of the buoy and the wreck were accurately depicted on the chart, and that the buoy was on station at the time of the accident. Instead, this case presents the different question—not decided in *Lane*—whether, once it has decided to mark a wreck, the government is liable under Section 86 for failing to select "the most effective and best means" to achieve that purpose (Pet. App. 22). As the court of appeals correctly concluded (*id.* at 19), "[t]he statute affords no basis for inferring a grant of judicial authority in a case such as the present to second-guess the [Secretary of Transportation's] judgment that a buoy rather than a daymarker was the preferable way of marking this wreck."[2]

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[2]Moreover, there is no basis in fact for concluding that the buoy was an inadequate marker, in view of the court of appeals' determination that Dr. Baxter's failure to see the buoy prior to the accident was due to his negligence in failing to maintain a proper lookout (Pet. App. 24-27 & n.13).

3. Petitioners also contend (Pet. 7-9) that the government was required to comply with the marking and removal requirements of 33 U.S.C. 409.[3] This contention was correctly rejected by the court of appeals.

Unlike the typical situation under Section 409 involving sunken vessels that constitute obstructions to navigation, this case involves the placement of a structure in a navigable channel for legitimate governmental purposes and pursuant to proper authority. As the court of appeals held (Pet. App. 16):

> The absolute prohibition in §409 against sinking a vessel in a navigable channel is obviously not intended to derogate from the federal government's power to place structures in otherwise navigable channels pursuant to its lawful authority. By the same token, the §409 requirement that a wreck be promptly removed is obviously not applicable to an obstruction which the government placed there for a proper governmental purpose

Thus, Section 409 is not controlling here.

This case involves the application of the statute's unambiguous terms to rather unusual facts. Petitioners

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[3]33 U.S.C. 409 provides in pertinent part:

> [W]henever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently * * *.

have not cited a single case (and we have found none) in which the question of the applicability of Section 409 has arisen in a similar context. The issue is thus not likely to recur and is not sufficiently important to warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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